

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ORLANDO MARTIN,

Plaintiff,

No. CIV S-05-0557 ALA P

vs.

ALVARO C. TRAQUINA, et at.,

Defendants.

ORDER

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Orlando Martin, a prisoner confined at California State Prison-Solano ("CSP-Solano"), has brought a pro se civil rights action under 42 U.S.C. § 1983 against Alvaro Traquina, M.D., CSP-Solano's Chief Medical Officer, Randall Osborn, D.P.M., a podiatrist under contract with CSP-Solano,<sup>1</sup> and Yen Dechant, a registered nurse employed by CSP-Solano. Mr. Martin asserts that Defendants violated his Eighth Amendment right against cruel and unusual punishment by

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<sup>1</sup> Dr. Osborn's contractor status is immaterial to Mr. Martin's claim against him, because "a private physician . . . under contract with a state to provide medical care to inmates acts 'under color of state law for purposes of section 1983 when undertaking his duties' to treat an inmate." *Farrow v. West*, 320 F.3d 1235, 1239 n.3 (11th Cir. 2003) (quoting *Carswell v. Bay County*, 854 F.2d 454, 456-57 (11th Cir. 1988)); *West v. Atkins*, 487 U.S. 42, 54 (1988).

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2 delaying and denying him medical treatment for his painful toenail condition. Defendants seek  
 3 summary judgment on Mr. Martin's claim, arguing that they did not act with deliberate  
 4 indifference. As explained below, summary judgment will be granted in favor of Ms. Dechant  
 5 and Dr. Osborn, and in favor of Dr. Traquina to the extent that Mr. Martin claims Dr. Traquina  
 6 failed to obtain a soft shoe chrono for him. Summary judgment will be denied with respect to  
 7 Mr. Martin's claim that Dr. Traquina caused an eleven-month delay in his receipt of surgery for  
 8 bone-spur removal.<sup>2</sup>

9 **I. Facts<sup>3</sup>**

10 Mr. Martin entered CSP- Solano on November 12, 2002. On arrival he asked prison  
 11 officials to issue him soft shoes, because the standard-issue hard boots hurt his feet. The  
 12 officials nevertheless assigned him hard boots, which caused his feet to swell and become  
 13 blistered.

14 On April 10, 2003 Dr. Oscar Mar examined Mr. Martin and requested that he be  
 15 examined by a podiatrist. On April 24, 2003 Mr. Martin was examined again, by a non-  
 16 podiatrist, and diagnosed with "caculus buildup" on both of his big toes. The examining doctor  
 17 made a second request that he see a podiatrist. Additional requests for Mr. Martin to see a

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 19 <sup>2</sup> Defendants argue in their reply brief that Mr. Martin "has failed to assert a single  
 20 admissible fact in opposition to . . . summary judgment" because he filed no affidavits or  
 21 declarations. Reply Brief at 3. They are incorrect. Mr. Martin's failure to file affidavits or  
 22 declarations does not preclude this Court from considering as evidence in opposition to summary  
 23 judgment the allegations contained in Mr. Martin's verified Second Amended Complaint. *See*  
*Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004) (when a plaintiff is *pro se*, a court must  
 consider as evidence in opposition to summary judgment all contentions that would be  
 admissible in evidence, are based on personal knowledge, and are contained in pleadings and/or  
 motions whose contents the drafter stated under penalty of perjury are true and correct.).

24 <sup>3</sup> The facts in this section are taken from Mr. Martin's verified Second Amended  
 25 Complaint. *See Jones*, 393 F.3d at 923 (allegations contained in a *pro se* plaintiff's verified  
 pleadings must be considered as evidence for purposes of summary judgment).

1 podiatrist were made in May, June, July, and September of 2003.

2 On June 3, 2003, Mr. Martin wrote a letter to Dr. Traquina. According to Mr. Martin's  
3 verified Second Amended Complaint Dr. Traquina was, as CSP-Solano's Chief Medical Officer,  
4 "responsible for arranging medical care for prisoners . . . and specialized care outside the  
5 prison." Mr. Martin's letter stated:

6 I have signed-up to see the . . . Orthopedic doctor since much, I have . . . Blistes  
7 [sic] up both of my feet, I've been here seven months in the C.D.C. system, and  
8 still have not seen them, I talk with the "Annex" doctor's and they say they can't  
9 help me about my feet . . . the boots i[s] making my feet very bad, and the pain is  
getting worser . . . I've tried my counsol [sic] . . . [and] annex doctor's, but know  
[sic] one seems to help, so now I come to you for your professional help.

10 Second Amended Complaint, Exh. 20. Upon receiving the letter, Dr. Traquina made a copy of it  
11 and sent it to a Dr. Toppenberg so that Dr. Toppenberg could interview Mr. Martin. Second  
12 Amended Complaint, Memorandum of Points and Authorities, at 3. Mr. Martin was first  
13 examined by a podiatrist on September 12, 2003.

14 On October 27, 2003, Dr. Osborn surgically removed both of Mr. Martin's big toenails.  
15 Mr. Martin suffers from Hepatitis-C, and therefore is not supposed to take Motrin because it  
16 hurts his liver. Mr. Martin told Dr. Osborn before the toenail-removal surgery that he had  
17 Hepatitis-C, but Dr. Osborn nevertheless prescribed him Motrin for post-operation pain.<sup>4</sup> Dr.  
18 Osborn did not prescribe Mr. Martin any antibiotics, open-toed sandals, a wheelchair, crutches,  
19 or a cane. Nor did Dr. Osborn arrange for Mr. Martin to be transported back to his living  
20 quarters or issue Mr. Martin a medical chrono, which is a form that would have instructed prison

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22 <sup>4</sup> Mr. Martin makes contradictory statements regarding what Dr. Osborn prescribed him.  
23 In his Second Amended Complaint, he alleges that "Dr. Osborn didn't give [him] any medication  
24 because after [Mr. Martin] informed him [that he had] 'Hepatitis-C' Osborn told [Mr. Martin]  
25 'he didn't know what to prescribe him and he didn't prescribe anything' . . ." In his opposition  
brief, however, Mr. Martin asserts that Dr. Osborn did prescribe him Motrin. Dr. Osborn states  
in his summary judgment brief and declaration that he prescribed the Motrin.

1 personnel to bring Mr. Martin's food to him in his quarters for one week.

2 Because Mr. Martin was not issued a wheelchair, given a ride back to his living quarters,  
3 or issued a medical chrono, he was forced to walk almost half a mile back to his prison building  
4 after the surgery, and to walk to the dining room for his meals during the ensuing week. These  
5 trips caused Mr. Martin extreme pain and bleeding in his feet, and caused his wounds to remain  
6 open. On November 3, 2003, at Mr. Martin's follow-up medical exam, Dr. Dwayne Highsmith  
7 determined that the post-surgical site had become infected and prescribed Mr. Martin antibiotics  
8 and additional pain medication. Mr. Martin later developed a bone spur on his right big toe,  
9 which had not been there before the surgery.

10 On each of the three days immediately following his surgery, Mr. Martin traveled to the  
11 prison clinic where Ms. Dechant worked as a nurse. There, he asked Ms. Dechant for medical  
12 treatment to alleviate his pain. He showed her his toes, which were bleeding, and she gave him  
13 fresh bandages. She did not send him to see a doctor, however, and told him he had to wait to  
14 see a doctor until his followup visit on November 3, 2003. She stated that "the bleeding [was]  
15 normal" and would "stop in due time." Ms. Dechant submits uncontroverted evidence that Mr.  
16 Martin's feet were not infected when she examined them on October 29, 2003, that she examined  
17 them again on November 3, 2003, and that on that date she noticed that "[h]is big toe had  
18 developed some redness and was slightly swollen with a small amount of drainage." Dechant  
19 Dec., ¶ 6.<sup>5</sup> She states that she did not call a doctor on November 3, 2003 because Mr. Martin  
20 was scheduled to see a doctor later that morning for his follow-up exam and there was no  
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22 <sup>5</sup> Mr. Martin asserts, in his brief opposing Ms. Dechant's summary judgment motion,  
23 that his big toe was infected on October 28, 2003, when he first visited the clinic. Opposition at  
24 9. The Court cannot consider that allegation as evidence, however, because Mr. Martin did not  
25 include an affidavit with the brief attesting under penalty of perjury to the truth of its contents,  
and the brief therefore is not a verified motion.

1 emergency that would warrant calling the doctor immediately. *Id.*

2 On January 16, 2004, Dr. Highsmith examined Mr. Martin and determined that he was  
3 still suffering from pain in his right toe. A Dr. Daniel Bunnell examined Mr. Martin on February  
4 4, 2004, and stated that there was no abnormality of the bone suggesting osteomyelites. Also on  
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6 February 4, 2004, Dr. Traquina examined Mr. Martin and noted that he was still suffering from  
7 pain in his toe, although it had healed and showed no signs of infection.

8 On April 23, 2004, Mr. Martin was diagnosed with a bone spur on his right big toe. The  
9 next day, on April 24, 2004, a Doctor Chin “requested ‘URGENT’ medical care for [Mr. Martin]  
10 to remove the bone spar [sic] and Dr. Highsmith was appointed to do the surgery.” According to  
11 CDC-Solano regulations, requests for care that are designated as “urgent” medical needs require  
12 treatment within twenty-four hours. Nevertheless, Mr. Martin did not receive the bone spur  
13 removal surgery for another fifteen months. The surgery was finally performed in July 2005.<sup>6</sup>

14 Mr. Martin filed at least two administrative complaints at CSP-Solano between 2002 and  
15 2005. He filed the first complaint in December 2003, requesting additional medical care for his  
16 feet and calling for an administrative investigation into the medical care he received from Dr.  
17 Osborn and Ms. Dechant. On February 3, 2004, Dr. Traquina issued a Second Level response to  
18 the complaint. The response stated that Mr. Martin’s request was partially granted on the ground  
19 that Mr. Martin had already received appropriate medical care, and that Dr. Traquina had  
20 interviewed Mr. Martin and ‘verified that both feet were well healed and there were no signs of  
21 infection.” “Additionally,” Dr. Traquina said in the response, “I advised you to have a follow-up

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23 <sup>6</sup> There is a dispute regarding when Mr. Martin received the bone spur-removal surgery.  
24 Mr. Martin maintains the surgery occurred in July 2005, while Dr. Traquina states it occurred on  
25 June 4, 2005. For purposes of summary judgment the Court must assume the truth of Mr.  
Martin’s assertion that the surgery was performed in July 2005.

1 consultation with the podiatrist to discuss the x-rays results and to request soft shoes chrono.”  
2 Dr. Traquina concluded that Mr. Martin had “failed to provide evidence that proves that Dr.  
3 Osborn and RN Deschant [sic] acted unprofessionally or have neglected your medical care.”  
4 Second Amended Complaint, Exh. 10.

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7 On April 7, 2004, Mr. Martin filed his second complaint: a CDC form entitled  
8 “Reasonable Modification or Accommodation Request.”<sup>7</sup> He wrote on the form that the toenail  
9 removal surgery “caused me to get a ‘bone spur’ in my ‘right toe,’” and complained of blisters  
10 and pain in his foot. He requested “an[] emergency appointment with an[] outside podiatry  
11 doctor to remove the bone spur . . .” Second Amended Complaint, Exh. 12.

12 On June 7, 2004, Dr. Traquina issued a Second Level response to the April 7, 2004  
13 complaint, stating “your appeal is partially granted in that you are receiving appropriate  
14 treatment for your post-op complications from Dr. Highsmith, who is one of our consulting  
15 physicians.” Exh. 12. The response explained that on April 23, 2004 Dr. Chin had examined  
16 Mr. Martin, “noted that your wound was healing well, with no sign of infection,” and concluded  
17 that the results of an x-ray were “negative.” Dr. Traquina also stated that Dr. Highsmith had  
18 noticed on June 4, 2004 that Mr. Martin had “a slight dorsal deformity of [his] right toe,” and  
19 that Mr. Martin was scheduled to see Dr. Highsmith again in thirty days. Exh. 12. On July 19,  
20 2004, Mr. Martin’s complaint was denied at the Director’s level. Exh. 12.

## 21 **II. Summary Judgment Standard**

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23 <sup>7</sup> The form stated, “You may use this form to request specific reasonable modification or  
24 accommodation which . . . would enable you to participate in a service, activity, or program  
25 offered by the . . . Institution/facility, for which you are otherwise qualified/eligible to  
participate.” Second Amended Complaint, Exh. 12.

1 Summary judgment may be granted in favor of a party “if the pleadings, depositions,  
2 answers to interrogatories, and admissions on file, together with the affidavits, if any, show that  
3 there is no genuine issue as to any material fact and that the moving party is entitled to judgment  
4 as a matter of law.” FED. R. CIV. P. 56(c). A party’s motion for summary judgment must be  
5 granted “after adequate time for discovery and upon motion . . . against a party who fails to make  
6 a showing sufficient to establish the existence of an element essential to that party’s case, and on  
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8 which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317,  
9 322 (1986).

10 Where the party resisting a motion for summary judgment is *pro se*, the court “must  
11 consider as evidence in his opposition to summary judgment all of [his] contentions offered in  
12 motions and pleadings, where such contentions are based on personal knowledge and set forth  
13 facts that would be admissible in evidence, and where [he] attested under penalty of perjury that  
14 the contents of the motions or pleadings are true and correct.” *Jones v. Blanas*, 393 F.3d 918,  
15 923 (9th Cir. 2004) (citing cases).

### 16 **III. Discussion**

17 Mr. Martin contends that Defendants violated his Eighth Amendment rights by failing to  
18 provide him with proper medical care, thus exacerbating the pain in his toes and causing him to  
19 suffer an infection and bone spur. “The unnecessary and wanton infliction of pain upon  
20 incarcerated individuals under color of law constitutes a violation of the Eight Amendment.”  
21 *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004) (quoting *McGuckin v. Smith*, 974 F.2d  
22 1050, 1059 (9th Cir. 1992)). “A violation of the Eighth Amendment occurs when prison  
23 officials are deliberately indifferent to a prisoner’s medical needs.” *Id.* at 1057.

24 “In the Ninth Circuit, the test for deliberate indifference consists of two parts.” *Jett v.*  
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1 *Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). “First, the plaintiff must show a ‘serious medical  
 2 need’ by demonstrating that ‘failure to treat a prisoner’s condition could result in further  
 3 significant injury or the ‘unnecessary and wanton infliction of pain.’” *Id.* (quoting *McGuckin*,  
 4 974 F.2d at 1059). “Second, the plaintiff must show the defendant’s response to the need was  
 5 deliberately indifferent.” *Id.* A plaintiff can show a defendant’s response was deliberately  
 6 indifferent by demonstrating “(a) a purposeful act or failure to respond to a prisoner’s pain or  
 7 possible medical need and (b) harm caused by the indifference.” *Id.* “Indifference ‘may appear  
 8 when prison officials deny, delay or intentionally interfere with medical treatment, or it may be  
 9 shown by the way in which prison physicians provide medical care.’” *Id.* (quoting *McGuckin*,  
 10 974 F.2d at 1059).

11 “A prison official acts with ‘deliberate indifference . . . only if [he or she] knows of and  
 12 disregards an excessive risk to inmate health and safety.” *Toguchi*, 391 F.3d 1057. “Under this  
 13 standard, the prison official must not only ‘be aware of facts from which the inference could be  
 14 drawn that a substantial risk of serious harm exists,’ but that person ‘must also draw the  
 15 inference.’” *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). “[D]eliberate  
 16 indifference to medical needs may be shown by circumstantial evidence when the facts are  
 17 sufficient to demonstrate that a defendant actually knew of a risk of harm.” *Id.* at 1057 n.4  
 18 (quoting *Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003)).

19 There is no dispute in this case that Mr. Martin suffered from a “serious medical need.”  
 20 Defendants do not contest that he suffered from calculus buildup, and later a bone spur, in his  
 21 toes, which caused severe pain that was certain to continue if left untreated. The only question,  
 22 therefore, is whether each of the Defendants failed to respond to Mr. Martin’s medical need  
 23 despite knowledge that their failure to respond created a substantial risk of serious harm to him.

#### 24 **A. Ms. Dechant**



1 Mr. Martin contends that Ms. Dechant acted with deliberate indifference by failing to call  
2 a doctor or send him to a doctor when he visited the prison clinic and showed her his bleeding  
3 toes on the three days following his October 27, 2003 toenail-removal surgery. Ms. Dechant's  
4 actions, he argues, caused his toes to become infected and caused him unnecessary pain.

5 Ms. Dechant presents uncontroverted evidence that Mr. Martin visited the annex clinic  
6 on October 29, 2003, and that at that time his wounds were clean and showed no swelling, active  
7 bleeding, or signs of infection.<sup>8</sup> She presents further uncontroverted evidence that Mr. Martin  
8 visited the clinic again on the morning of November 3, 2003, that by then his big toe "had  
9 developed some redness and was slightly swollen with a small amount of drainage," and that she  
10 decided not to call a doctor because Mr. Martin was scheduled to see the doctor later that  
11 morning.

12 Mr. Martin's evidence is insufficient to create a genuine issue of material fact regarding  
13 whether Ms. Dechant "kn[ew] of [or] disregard[ed] an excessive risk to [his] health and safety."  
14 *Toguchi*, 391 F.3d 1057. Nothing in the record indicates that Ms. Dechant knew of a significant  
15 risk that failure to clean Mr. Martin's wounds or send him to a doctor on the days after his  
16 surgery would cause him significant injury or unnecessary pain. On the contrary, Mr. Martin  
17 asserts in his Second Amended Complaint that Ms. Dechant stated that the bleeding on his toes  
18 was "normal" and would "stop on its own." Second Amended Complaint, Memorandum of  
19 Points and Authorities, at 14. That statement indicates that Ms. Dechant believed there was no  
20 significant danger of infection. While she may have been wrong, that mistake is insufficient to  
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22 <sup>8</sup> Mr. Martin alleges in his opposition to Ms. Dechant's summary judgment motion that  
23 his wound was infected when he visited the clinic on October 28, 2003, the day after his surgery,  
24 and that Ms. Dechant instructed another clinic employee not to clean his wound. The Court  
25 cannot consider these allegations as evidence in opposition to Ms. Dechant's motion for  
summary judgment because they Mr. Martin's opposition brief is not verified.

1 constitute deliberate indifference. *Toguchi*, 391 F.3d at 1057 (“Mere negligence in diagnosing or  
2 treating a medical condition, without more, does not violate a prisoner’s Eighth Amendment  
3 rights.”). *See also Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (“Medical malpractice does not  
4 become a constitutional violation merely because the victim is a prisoner.”). Summary judgment  
5 must therefore be granted in favor of Ms. Dechant.

6 **B. Dr. Osborn**

7 Mr. Martin asserts that Dr. Osborn acted with deliberate indifference by (1) prescribing  
8 him Motrin, when he could not take Motrin because he suffered from Hepatitis-C, and failing to  
9 prescribe any other means of pain relief; (2) failing to ensure that he received the Motrin he was  
10 prescribed; (3) failing to prescribe him anti-infection medication; (4) performing the surgery in  
11 an unsanitary room; (5) failing to obtain a consent form from Mr. Martin before surgically  
12 removing his toenails, and performing the surgery after Mr. Martin asked that Dr. Highsmith  
13 perform the surgery instead. These contentions are addressed separately.

14 **1. Prescribing Motrin Despite Mr. Martin’s Hepatitis-C, and Failing to**  
15 **Provide Other Means of Pain Relief**

16 Mr. Martin contends that Dr. Osborn acted with deliberate indifference by prescribing  
17 him Motrin, which Mr. Martin could not take because of his Hepatitis-C, and by failing to  
18 provide him with any other means of pain relief. He contends that Dr. Osborn should have  
19 prescribed him additional painkillers, open-toed sandals, a crutch or cane, and/or a wheelchair,  
20 written him a medical chrono providing for his food to be brought to him in his room for one  
21 week, and arranged for him to be transported from the surgery back to his living quarters. He  
22 states he asked Dr. Osborn for a wheelchair, a ride back to his building after the surgery, and a  
23 medical chrono for his food to be brought to him for one week, but that Dr. Osborn refused his  
24 requests.

1 Dr. Osborn contends that he did not believe Mr. Martin faced a significant risk of post-  
2 operative pain, and that Mr. Martin never asked him for a wheelchair, crutches, soft shoes “or  
3 any other remedial [pain relief] measure[s].” Osborn Decl., ¶ 11. He did not prescribe a  
4 wheelchair, he states, because it “was not medically required after removal of [Mr. Martin’s]  
5 toenails and for this type of procedure would never be provided to any patient under the  
6 circumstances.” Osborn Decl. at ¶ 7. He states that “[i]mmediately after surgery for removal of  
7 toenail there is no pain because the toe is still under the effects of local anesthetic for  
8 approximately 2-3 hours.” Osborn Decl. at ¶ 7.

9 Mr. Martin has failed to present sufficient evidence to create a genuine issue of fact  
10 regarding whether Dr. Osborn acted with deliberate indifference in failing to prescribe him pain-  
11 prevention measures for the journey back to his living quarters. No evidence suggests that Dr.  
12 Osborn knew that Mr. Martin would experience pain during the walk, that Mr. Martin’s shoes  
13 hurt his feet, or that the walk back to Mr. Martin’s living area was half a mile long.<sup>9</sup> It is  
14 undisputed that Dr. Osborn believed the local anesthetic would prevent Mr. Martin from  
15 experiencing pain for two to three hours after the surgery. Although Dr. Osborn’s assessment of  
16 Mr. Martin’s need for pain-prevention immediately after surgery may have been incorrect,  
17 “[m]ere negligence in diagnosing or treating a medical condition, without more, does not violate  
18 a prisoner’s Eighth Amendment rights.” *Toguchi*, 391 F.3d at 1057.

19 Mr. Martin also has failed to present sufficient evidence to create a genuine issue of fact  
20 as to whether Dr. Osborn acted with deliberate indifference in failing to provide means other  
21 than Motrin to mitigate Mr. Martin’s pain more than two to three hours after surgery. Mr.

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23 <sup>9</sup> Mr. Martin asserts in his opposition brief that he asked Dr. Osborn for soft shoes, but  
24 the Court cannot consider that allegation because the opposition brief is not a verified motion.  
25 Mr. Martin presents no affidavits or other evidence to support his claim that he asked Dr. Osborn  
for soft shoes.

1 Martin states that he had Hepatitis-C, but presents no evidence that he informed Dr. Osborn of  
 2 any specific risk he would face if he took Motrin. This Court has searched for, but been unable  
 3 to find, any judicially-noticeable medical authority indicating that Motrin is unsafe for patients  
 4 who have Hepatitis-C. *See United States v. Howard*, 381 F.3d 873, 880 n.7 (9th Cir. 2004)  
 5 (parenthetically citing *Lolli v. County of Orange*, 351 F.3d 410 (9th Cir. 2003) for the  
 6 proposition that “[w]ell-known medical facts are the types of matters of which judicial notice  
 7 may be taken.” (emphasis added)). The evidence is therefore not sufficient to permit a  
 8 reasonable jury to conclude that Dr. Osborn knew of a risk, or even that a risk existed, that Mr.  
 9 Martin would suffer medical harm or unnecessary pain if he was prescribed Motrin. Nor is there  
 10 any evidence that Dr. Osborn actually knew that Mr. Martin would need other means of pain  
 11 relief. Dr. Osborn’s apparent belief that Motrin would sufficiently control Mr. Martin’s pain  
 12 precludes the existence of a genuine issue of material fact as to whether he acted with deliberate  
 13 indifference.

## 14 **2. Failure to Ensure that Mr. Martin Received the Prescribed Pain** 15 **Medication**

16 Mr. Martin contends that Dr. Osborn “intentionally failed to place the [Motrin]  
 17 prescription before the MTA so he/she could have the pharmacist fill it thereby denying him the  
 18 badly needed pain killing medication he needed.” Opposition Brief at 2. No evidence in the  
 19 record supports that assertion. It therefore is insufficient to create a genuine issue of material  
 20 fact for purposes of summary judgment.

## 21 **3. Failure to Prescribe Anti-Infection Medication**

22 Mr. Martin also asserts that Dr. Osborn knew of and disregarded a significant risk that his  
 23 toes would become infected if Dr. Osborn did not prescribe anti-infection medication. He states  
 24 that he “was a prisoner[] living in a housing u[nit] holding more than 200 other prisoners, that in  
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1 such a housing unit the p[lace] wasn't likely to be clean especially since many prisoners get sick  
 2 there and . . . most of the prisoners [were] on some type of powerful medication and there wasn't  
 3 any way such a building could be kept clean . . ." Opposition Brief at 3. "[A]ny good doctor,"  
 4 he argues, "would have recognized the risk of infection and took proper action to prevent it by  
 5 providing the plaintiff with anti infection medication . . ." *Id.*

6 Mr. Martin's argument is insufficient to establish a genuine issue of fact as to deliberate  
 7 indifference. At most, it suggests the existence of facts that, *if known to Dr. Osborn, could have*  
 8 *or should have* alerted Dr. Osborn that Mr. Martin faced a significant risk of infection.  
 9 However, "[i]f a [prison official] should have been aware of [a] risk, but was not, then the  
 10 [official] has not violated the Eighth Amendment, no matter how severe the risk." *Toguchi*, 391  
 11 F.3d at 1057 (quoting *Gibson*, 290 F.3d at 1188). No evidence in the record suggests that Dr.  
 12 Osborn actually knew the nature of Mr. Martin's living conditions. Even assuming Dr. Osborn  
 13 did know the nature of those conditions, and should have concluded that they posed a significant  
 14 risk of infection, there is no evidence that Dr. Osborn actually made that inference. The only  
 15 evidence in the record relating to Dr. Osborn's subjective knowledge is that he knew toenail-  
 16 removal surgery posed a small risk of infection, and that he believed the risk was small in Mr.  
 17 Martin's case. The record contains no evidence of deliberate indifference.

#### 18 **4. Performing Toenail-Removal Surgery in an Unsanitary Room**

19 Mr. Martin asserts that "[t]he operating room in the primary clinic wasn't properly  
 20 cleaned 'sanitized' for Osborn to [d]o the surgery yet he did it anyway." Second Amended  
 21 Complaint, ¶ 12. He fails, however, to support that assertion with any specific allegations  
 22 regarding the condition of the room. *See Adams v. Pate*, 445 F.2d 105, 107 (7th Cir. 1971)  
 23 (plaintiff's allegation of "unsanitary living conditions" was insufficient to state an Eighth  
 24 Amendment claim, because it was "unaccompanied by any specific allegations, which if proved,

1 would establish that the segregated confinement constituted cruel or unusual punishment . . .”)  
2 Mr. Martin also presents no evidence that the operating room conditions caused his infection or  
3 otherwise harmed him. Summary judgment is therefore proper as to Mr. Martin’s allegation  
4 with respect to the operating room conditions.

5 **5. Failure to Obtain a Consent Form/ Performing Surgery Despite Mr.**  
6 **Martin’s Requests for Dr. Highsmith**

7 Mr. Martin asserts that “[Dr.] Osborn forced himself on the Plaintiff and failed to get the  
8 Plaintiff to sign a consent form [before the toenail-removal surgery,] thereby violating state law  
9 by operating on him without a signed consent . . .” Opposition Brief at 6. He contends that he  
10 “made it clear to Osborn that he didn’t want Osborn to do the surgery [and] that he wanted Dr.  
11 Highsmith to do the surgery and . . . [Osborn] threatened to deny [Mr. Martin] surgery for  
12 months if he didn’t allow him to do the surgery, [saying] ‘If I don’t do this surgery today you  
13 will have to wait another six months or more for surgery.’” Opposition Brief at 5. He claims he  
14 “was in too much pain to wait another six months for surgery so . . . he allowed Osborn to do the  
15 surgery . . .” *Id.* at 6.

16 These allegations are insufficient to create a triable issue of fact as to whether Dr. Osborn  
17 violated Mr. Martin’s Eighth Amendment rights. They indicate merely that Dr. Osborn informed  
18 Mr. Martin of his options: permit Dr. Osborn to perform the surgery, or wait six months to have  
19 Dr. Highsmith do it. No evidence indicates that Dr. Osborn lied when he said Dr. Highsmith  
20 would not be available for six months, or that Dr. Osborn otherwise coerced Mr. Martin into  
21 permitting him to remove his toenails.

22 Nor has Mr. Martin presented any evidence that he was harmed by Dr. Osborn  
23 performing the surgery instead of Dr. Highsmith. Nothing in the record suggests that Dr.  
24 Highsmith would have performed the toenail-removal surgery differently than did Dr. Osborn, or  
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1 that Dr. Osborn was unqualified to perform the surgery. Mr. Martin argues that Dr. Highsmith  
2 would have done a better job than Dr. Osborn, because Dr. Highsmith gave Mr. Martin crutches  
3 and a medical chrono after removing his bone spur in July 2005. The difference in the post-  
4 operation treatment Mr. Martin received from Drs. Osborn and Highsmith, however, likely  
5 resulted from the different procedures each doctor performed. It does not indicate that the two  
6 doctors would have taken different approaches to toenail-removal.

7 Mr. Martin also has not presented evidence that he was harmed by Dr. Osborn's failure to  
8 obtain a consent form from him. He does not allege that he would not have signed such a form,  
9 or that he did not choose to have the surgery. Instead, he admits that he chose to be operated on  
10 by Dr. Osborn instead of waiting for six months to be operated on by Dr. Highsmith. Summary  
11 judgment must be granted in favor of Dr. Osborn.

12 **C. Dr. Traquina**

13 Mr. Martin argues that Dr. Traquina violated his Eighth Amendment rights by (1)  
14 delaying Mr. Martin's toenail-removal surgery for four months after Mr. Martin sent Dr.  
15 Traquina his June 3, 2003 letter requesting medical attention; and (2) delaying the bone spur-  
16 removal surgery for eleven months "after Dr. Chen issued an 'URGENT' request for bone-spur  
17 surgery on 4-24-04," and (3) causing Mr. Martin's numerous requests for a soft shoe chrono to  
18 be denied. He contends that Dr. Traquina, as CSP-Solano's Chief Medical Officer, is  
19 "responsible for ensuring that medical care to prisoners [is] provided by his medical staff, for  
20 scheduling medical appointments outside the prison when a prisoner needs specialized treatment  
21 or evaluation, [and] for ensuring that his medical staff follows all laws [and] constitutional  
22 amendment rights." Complaint at 2. According to Mr. Martin, Dr. Traquina has an "illegal stall,  
23 delay, deny policy of withholding medical care for prisoners as long as possible." Second  
24 Amended Complaint, Form Complaint, at 3.

1                   **1.       Delays in Surgery**

2                   “[W]hen . . . a claim alleges ‘mere delay of surgery,’ a prisoner can make ‘no claim for  
3 deliberate medical indifference unless the denial was harmful.’” *McGuckin*, 974 F.2d at 1060  
4 (quoting *Shapley v. Nevada Board of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985)  
5 (per curiam)). The unnecessary continuation of a prisoner’s condition during a delay in  
6 receiving surgery fulfills the “harm” requirement. *Id.* at 1062. Mr. Martin has failed to present  
7 any evidence that he was harmed by the delay in receiving his toenail-removal surgery, because  
8 there is no evidence that the toenail-removal surgery was necessary to alleviate the pain in his  
9 feet. In fact, all the evidence indicates that his pain worsened after the toenails were removed.  
10 Consequently, even assuming that Dr. Traquina delayed the toenail removal surgery, that delay  
11 cannot be the basis of a § 1983 claim.

12                   Mr. Martin has, however, sufficiently alleged that he was harmed by the delay in his bone  
13 spur-removal surgery, because he asserts that the delay caused him constant pain. He has also  
14 submitted sufficient evidence to create a genuine issue of fact as to whether Dr. Traquina was  
15 responsible for that delay, and acted with deliberate indifference in failing promptly to order the  
16 surgery. He alleges that Dr. Traquina was responsible for scheduling surgeries, and that Dr.  
17 Traquina knew that Dr. Chin had ordered bone-spur removal surgery to be performed on Mr.  
18 Martin within twenty-four hours on April 24, 2004. He also attaches to his Second Amended  
19 Complaint Dr. Traquina’s Second Level response, dated March 4, 2005 - eleven months after Dr.  
20 Chin ordered that Mr. Martin receive “urgent” surgery. Second Amended Complaint at 16-17.  
21 In the response, Dr. Traquina acknowledges that Mr. Martin claims he is “going through  
22 suffering due to your need for additional toe surgery, and states merely “[w]e are sorry for the  
23 delay in this rescheduling of your podiatry appointment.” Exh. to Opposition to Summary  
24 Judgment. Dr. Traquina’s response provides no explanation as to why eleven months have  
25



1 passed without Mr. Martin receiving the bone spur-removal surgery that Doctor Chin stated  
 2 should have been done within twenty-four hours. This evidence is sufficient to create a triable  
 3 issue of fact as to whether Dr. Traquina acted with deliberate indifference. *See Farrow*, 320  
 4 F.3d 1235, 1246-47 (11th Cir. 2003) (triable issue of fact existed as to deliberate indifference,  
 5 where plaintiff prisoner suffered a “substantial and inordinate delay” in receiving dentures and  
 6 his dentist was aware he was experiencing pain, bleeding gums, and weight loss due to lack of  
 7 dentures); *Hunt v. Dental Department*, 865 F.2d 198, (9th Cir. 1989) (defendant prison medical  
 8 administrator, dentist, and medical assistant not entitled to summary judgment on plaintiff  
 9 prisoner’s Eighth-Amendment claim arising from a three-month delay in receiving dentures,  
 10 where defendants knew the lack of dentures was causing severe pain, weight loss, and permanent  
 11 damage to plaintiff’s teeth); *Hathaway v. Coughlin*, 841 F.2d 48, 50-51 (2nd Cir. 1988)  
 12 (reversing summary judgment in favor of defendant prison administrators on plaintiff prisoner’s  
 13 claim that defendants acted with deliberate indifference in causing a delay of over two years in  
 14 arranging for surgery to correct broken pins in plaintiff’s hip).

15 /////

16 /////

## 17 **2. Denial of Soft Shoe Chrono**

18 Mr. Martin also contends that Dr. Traquina is liable under § 1983 because he “refused to  
 19 approve a soft shoe chrono [requested by Mr. Martin] in 2003” and “refused [Mr. Martin’s]  
 20 request for soft shoes from Nov. 2002 all the way till after the bad surgery on 11-27-03 and well  
 21 into 2004 before he received the soft shoe chrono.” Opposition Brief at 23. These allegations  
 22 are insufficient to withstand summary judgment, because Mr. Martin provides no evidence that  
 23 Dr. Traquina was responsible for approving soft shoe chronos or had any control over whether  
 24 Mr. Martin received soft shoes. Mr. Martin admits that when Dr. Traquina received Mr.

1 Martin's June 3, 2003 letter complaining of foot pain Dr. Traquina "made a copy of the letter and  
 2 sent it to Dr. Toppenberg for him to interview Plaintiff." Second Amended Complaint,  
 3 "Memorandum of Points and Authorities," at 3. Dr. Traquina presents uncontroverted evidence  
 4 that he reviewed Mr. Traquina's second level appeals, personally interviewed Mr. Martin on  
 5 February 2, 2004, and "advised him to have a follow-up consultation with the podiatrist to . . .  
 6 request a soft shoe chrono." Traquina Decl. at ¶ 4. That evidence suggests that at CSP-Solano  
 7 soft shoe chronos were to be requested by the examining podiatrist, and not by the Chief Medical  
 8 Officer. Dr. Traquina is therefore entitled to summary judgment on Mr. Martin's claim that Dr.  
 9 Traquina failed to secure him a soft shoe chrono.

#### 10 **IV. Conclusion**

11 For the foregoing reasons, summary judgment on Mr. Martin's Eighth Amendment  
 12 claims is GRANTED in favor of Ms. Dechant and Dr. Osborn, and GRANTED in favor of Dr.  
 13 Traquina with respect to Mr. Martin's claims that Dr. Traquina delayed his toenail-removal  
 14 surgery and prevented him from receiving a soft shoe chrono. Summary judgment is DENIED  
 15 with respect to Dr. Traquina to the extent Mr. Martin asserts that Dr. Traquina delayed his bone  
 16 spur-removal surgery.

17 /////

18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. Defendant Osborn's September 21, 2006, motion for summary judgment is  
 20 GRANTED;
- 21 2. Defendant Dechant's September 21, 2006, motion for summary judgment is  
 22 GRANTED; and
- 23 3. Defendant Traquina's September 21, 2006, motion for summary judgment is  
 24 GRANTED with respect to Mr. Martin's claims that Dr. Traquina delayed his toenail-removal

surgery and prevented him from receiving a soft shoe chrono, and DENIED with respect to Mr. Martin's claim that Dr. Traquina delayed his bone spur-removal surgery.

DATED: August 2, 2007

/s/ Arthur L. Alarcón  
UNITED STATES CIRCUIT JUDGE  
Sitting by Designation